91-70

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BLUE FLAME, INC.,
Petitioner.

v.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF INDIANA

***

PETITION FOR WRIT OF CERTIORARI

***

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THE QUESTION PRESENTED FOR REVIEW:

Are the rights of Petitioner to freedome of expression under the First Amendment Of The Constitution Of The United States violated by the injunctive application of the provisions of the Adult Entertainment Business Ordinance of Marion County, Indiana, which prohibits the operation of an adult cabaret within 500 feet of a residential zoning district, under the circumstances in this case in which all usage within 500 feet is commercial, and the small area which is zoned residential is and has been used exclusively for parking for commercial businesses.

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The Petitioner, Blue Flame, Inc., is a corporation, duly incorporated under the laws of the State Of Indiana, and does not have a parent company or corporation, and does not have an interest in a non-wholly owned subsidiary.

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OPINION BELOW:

The basic decision involved in this application is the FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT entered by the Marion County Municipal Court, unreported, which is annexed to this petition in Appendix A, beginning at p. A-1. That Court therein held that the Adult Entertainment Business Ordinance prohibits the location of an adult cabaret within 500' of a residential zoning district; that the use of Petitioner's real estate by females performing with uncovered and exposed breasts and buttocks constitutes the operation of an adult cabaret as that term is defined within the ordinance, that the adult cabaret is operating upon Petitioner's real estate within 500' of a residential zoning district, and that Petitioner (as Defendant therein) is enjoined from using the said real estate, the injunction to run with the land.

Upon appeal, the Court Of Appeals Of

Indiana, in an unreported MEMORANDUM DECISION which is annexed to this petition in Appendix A, beginning at p. A-9 , held that although Petitioner (Appellant therein) contended that the application of the ordinance constitutes a prior restraint on freedom of expression, under the First Amendment of the United States Constitution, where the zoned residential area within the 500' radius is not used for residential purposes, yet the stated purpose of the ordinance established a legitimate governmental interest, and by regulating the proximity of adult cabarets to residentially zoned districts, the ordinance does not interfere with the rights protected by the First Amendment. (underlining added)

The Court Of Apeals denied Petitioner's Petition For Rehearing without opinion, and upon Petition To Transfer, in which Petitioner asserted that the decision of the Court Of Appeals was in error in that Petitioner is entitled to use its premises

as they are zoned and according to the uses actually permitted within the 500' as opposed to the zoning classification, where the factual use is commercial, and that Petitioner was thus being denied its rights to freedom of expression under the First Amendment to the Constitution Of The United States Of America, the Supreme Court Of Indiana denied the petition to transfer without opinion.

JURISDICTION

The judgment of the Court Of Appeals Of Indiana was entered on September 24, 1990. A timely petition for rehearing was denied on November 20, 1990. A timely petition to transfer was denied by the Supreme Court Of Indiana on April 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 and Rule 13 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Adult Entertainment Business Ordinance of Marion County, Indiana, 60-A0-2, is set out in Appendix B, commencing at p. B-1, in pertinent parts, prohibiting the operation of an adult cabaret within 500 feet of a residential zoning district.

STATEMENT OF THE CASE

The Petitioner, Blue Flame, Inc., is the operator of a tavern located at 5478 Brookville Road, Marion County, Indianapolis, State of Indiana, and the tavern is zoned C-5 for retail commercial uses.

The tavern, as an adult cabaret, is within the provisions of the Adult Entertainment Business Ordinance which in terms prohibits the operation of such an adult cabaret within 500 feet of a residential zoning district.

The area within 500 feet of Petitioner's tavern is almost exclusively zoned commercial and industrial, there being two exceptions to the Northwest and extreme East, which were both being used for commercial purposes--parking areas for a construction company and a hardware firm.

As hereinabove noted, the lower Court, the Marion County Municipal Court, held that the said ordinance prohibits the location of the adult cabaret within 500' of a resi-

dential zoning district, and that the use of Petitioner's real estate by females performing with uncovered and exposed breasts and buttocks constitutes the operation of an adult cabaret, and that such adult cabaret is prohibited by the ordinance from operating within 500' feet of the residential zoning districts. The ordinance was technically applied without regard to the actual commercial usage of the two areas zoned residential.

Upon appeal, as above noted, the Court Of Appeals Of Indiana noted that Petitioner contended that the application of the ordinance constituted a prior restraint on freecom of expression, under the First Amendment Of The United States Constitution, where the two areas within the 500' radius are in fact used for commercial purposes although technically zoned residential, but the Court Of Appeals held that the ordinance does not interfere with the rights protected by the First Amendment in regu-

lating the proximity of adult cabarets to residentially zoned (emphasis added) districts.

The Supreme Court Of Indiana thereafter denied Petitioner's petition to transfer on Petitioner's stated contention that the decision of the Court Of Appeals is in error in that Petitioner is entitled to use its premises as zoned and according to the uses actually permitted within the 500' radius as opposed to the zoning classification--where the factual use is commercial.

REASONS FOR GRANTING WRIT

This is not a public nudity case, per se, and there is no issue argued as to obcenity. The ordinance does not prohibit the particular dancing activity, except as to location, allowing it as to a commercial location (Petitioner's tavern being in such a location, C-5), but not allowing it even in a commercial location if there is any real estate zoned residential located within 500 feet. The ordinance is deemed a

state statute for purposes of invoking jurisdiction of this Court to review the validity of a state statute assailed as unconstitutional,

> Ergnoznik v. City Of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268,2277, 45 L. Ed. 2d 125 (1975)

and the ordinance is overbroad in its application to the live dancing featured by the Petitioner, and, under the factual circumstances, constitutes a prior restraint of freedom of expression in violation of the First Amendment.

> Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981)

In the recent case of Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana, et al., v. Glen Theatre, Inc., et al, No. 90-26, decided June 21, 1991, this Court noted that nude dancing is expressive conduct within the outer perimeters of the First Amendment, although the majority of this Court held that pasties and a G-string moderate the expression only to a degree,

simiply making the message slightly less graphic, and that:

a. Incidental restriction on First Amendment freedom can be no greater than is essential to the furtherance of the governmental interest served by the prohibition;

(citing United States v. O'Brien, 391 U.S. 367 (1968)

b. The governmental interest served by the prohibition is societal disapproval of nudity in public places and among strangers;

c. And that the public indecency statute is "narrowly tailored", the requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose.

The Court Of Appeals of Indiana quoted the "purpose" provision of the subject ordinance in this case at bar, including the following:

> "In the development and adoption of this ordinance, it is recognized that there are some adult business uses which due to their very nature have serious objectionable operational

> characteristics particularly when located in close proximity to residential neighborhoods, thereby having a deleterious impact upon property values and the quality of life in surrounding areas. It has been acknowledged by communities across the nation that state and local governmental entities have a special concern in regulating the operation of such businesses under their jurisdiction to ensure that these adverse secondary effects will not contribute to the blighting or downgrading of adjacent neighborhoods nor endanger the well-being of the youth in their communities. The special regulations deemed necessary to control the undesirable externalities arising from these enterprises are set forth below. The primary purpose of these controls and regulations is to preserve the integrity and character of residential neighborhoods, to deter the spread of urban blight and to protect minors from the objectionable operational characteristics of these adult uses by restricting their close proximity to churches, parks, schools and residential areas."

It is respectfully submitted that this restriction on First Amendment freedom is obviously greater than is essential to the furtherance of the governmental interest served by the prohibition.

The stated governmental interest, supra, is the protection of the "neighborhoods", the well-being of the "youth in

their communities", the "integrity and character of residential neighborhoods", and "to protect minors from the objectionable operational characteristics of these adult uses by restricting their close proximity to churches, parks, schools and residential areas."

A parking lot for a commercial business is not a neighborhood, a community, or a residential area, and it is not possible to understand how it could be adversely affected by the "urban blight" of an adult cabaret.

In Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), cited in Barnes v. Glen Theatre, Inc., supra, the "time, place or manner" test for evaluating restrictions on expression taking place on public property was applied to conduct occurring on private property, and as noted in the concurring opinion of Justice Souter, this Court upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary

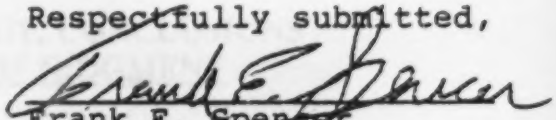
effects associated with adult entertainment, holding that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems that would be caused by adult theaters in that city, but rather that Renton "was entitled to rely on the experiences of Seattle and other cities" which demonstrated the harmful secondary effects correlated with the presence of "even one (adult) theater in a given neighborhood." (underlining added) As further noted by Justice Souter, 59 LW 4752,in Young v. American Mini Theatres, Inc., 427 U.S. 50, 7 1, n. 34 (1976) this Court had referred to a legislative finding that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime". That case also concerned a consideration of the adverse impact of the excluded use on surrounding neighborhoods. It is respectfully submitted that there is no precedent, or showing in this case at bar, that there is

a justifying harmfull secondary effect on parking lots of commercial enterprises associated with an adult cabaret within 500 feet of such parking lots.

CONCLUSION

For the foregoing reasons this Petition For Writ Of Certiorari to the Supreme Court Of Indiana should be granted.

Respectfully submitted,



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STATE OF INDIANA	)	IN THE MARION COUNTY
	) SS:	MUNICIPAL COURT
COUNTY OF MARION	)	CAUSE NO. E1226-072
		ROOM NO. 12

THE METROPOLITAN DEVELOPMENT)
COMMISSION OF MARION COUNTY,)
Plaintiff,)
)
v.)
)
BLUE FLAME, INC.)
Defendant.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause having come to trial on August 16, 1989, and evidence and testimony having been received on August 16, 1989 and on August 21, 1989, and the cause having been taken under advisement by the Court pending submission of post-trial briefs, the Court now issues the following entry:

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and subject matter of this action.

2. The Metropolitan Development Commission of Marion County (hereinafter called the "Commission") is a governmental entity established by Indiana Code Sec. 36-7-4-202(c).

3. Defendant, Blue Flame, Inc., is the owner of the real estate commonly referred to as 5478 Brookville Road, Indianapolis, Marion County, Indiana, and more particularly described as:

> Lots 9 and 10 in Chambers and Tomlinson's Addition to Irvington, now a part of the City of Indianapolis, the plat of which is recorded in Plat Book 7, page 40, in the office of the Recorder of Marion County, Indiana, except that part of said Lot 10 taken for the opening of an alley lying West of and adjacent to said Lot 10 as disclosed in opening and vacation Record 9, page 176.

(hereinafter call the "Real Estate").

4. The Real Estate is zoned to a C-5 zoning classification.

5. The Adult Entertainment Business Ordinance of Marion County, Indiana, was adopted by the City-County Council of Indianapolis, Marion County, Indiana, on July 9, 1984.

6. The Adult Entertainment Business Ordinance of Marion County, Indiana, contains provisions relating to adult cabarets as defined by said ordinance.

7. The Adult Entertainment Business Ordinance of Marion County, Indiana contains provisions relating to the location and/or operation of an adult cabaret within five hundred feet

(500') of a residential zoning district.

8. The Real Estate is situated closer than 500' to a residential zoning district within Marion County, Indiana.

9. A use variance was sought by the Defendant, Blue Flame, Inc., i 1986, under Docket NO. 86-UV3-35, which use variance was denied by the Metropolitan Board of Zoning Appeals of Marion County, Indiana.

10. The denial of the requested use variance was appealed by the petitioner to the Marion Superior Court, Civil Division, Room 3, b way of a certiorari proceeding, Cause No. S386-0872, and the trial court affirmed the denial of the requested use variance.

11. The trial court decision in Cause No. S386-0872 was affirmed by the Court of Appeals of Indiana on December 6, 1988, in Docket No. 49A04-8711-CV-352.

12. No use variance has been granted by the Metropolitan Board of Zoning Appeals or any other governmental entity authorizing use of the Real Estate as an adult cabaret or as any other adult facility or establishment.

13. Live entertainment in the form of country western bands or other bands was provided upon the Real Estate from the late 1960's through 1985 when the property was conveyed by Noel Seablot to Blue Flame, Inc. In December 1985 or January 1986, Defendant, Blue Flame, Inc., hired female entertainers and commenced the practice of having those female dancers performing within the establishment situated upon the Real Estate.

14. Since December 1985 or January 1986, female dancers performing within the establishment situated upon the Real Estate have danced on a regular, routine and frequent basis with their breasts fully uncovered and exposed.

15. Since December 1985 or January 1986, female dancers performing within the establishment situated upon the Real Estate have danced on a regular, routine and frequent basis with their buttocks uncovered and exposed.

CONCLUSIONS OF LAW

1. The Commission is empowered by Indiana Code Sec. 36-7-4-1014 to institute a lawsuit to enforce, inter alia, the provisions, terms and restrictions of Marion County zoning ordinances.

2. The Adult Entertainment Business Ordinance of Marion County, Indiana, duly promulgated on July 9, 1984, remains in full force and effect.

3. The Adult entertainment Business Ordinance of Marion County, Indiana, prohibits the location of an adult cabaret within 500' of a residential zoning district.

4. The use of the Real Estate by females performing with uncovered and exposed breasts and buttocks constitutes the operation of an adult cabaret as that term is defined within the Adult Entertainment Business Ordinance of Marion County, Indiana.

5. The Commission established its entitlement to an injunction in this case in accordance with the provisions of DeSchamps vs. Board of Zoning Appeals,, (1961) 241 Ind. 615, 174 N.E.2d 581; Metropolitan Development Commission of Marion County v. Douglas, (1979) 180 Ind.App. 567, 390 N.E.2d 663; and, Melton v. Area Plan Commission of Evansville, (1974) 160 Ind.App. 476, 312 N.E.2d 501.

6. The Commission established the existence of the Adult Entertainment Business Ordinance of Marion County,

Indiana, and Zoning Ordinance 60-A0-2 by introducing into evidence certified copies thereof.

7. The Commission established violations of the Adult Entertainment Business Ordinance of Marion County, Indiana, by establishing that an adult cabaret is operating upon the Real Estate within Five Hundred Feet (500') of a residential zoning district.

8. Indiana Code Section 36-7-4-1019 requires that a Defendant raising the affirmative defense of nonconforming use carry the burden of proof on that issue.

9. Defendant, Blue Flame, Inc., failed to carry its burden of proof respecting the affirmative defense of nonconforming use by failing to prove that the use of the Real Estate as an adult cabaret was:

(a) a lawfully established use,

(b) existing on the effective date of the current zoning ordinance,

(c) which has not been abandoned, enlarged, expanded, or otherwise terminated by operation of law.

Metropolitan Development Commission of Marion County v. Marianos (1979), Ind.App., 401 N.E.2d 28; Jacobs v. Mishawaka

Board of Zoning Appeals (1979), 18/2 Ind.App. 500, 395 N.E.2d 834; City of Beech Grove v. Schmith (1975), 164 Ind.App. 536, 329 N.E.2d 605; Ashley v. City of Bedford (1974), 160 Ind.App. 634, 312 N.E.2d 863; O'Banion v. State ex rel. Shively (1969), 146 Ind.App. 223, 253 N.E.2d 739; Chizum v. Elkhart County Plan Commission (1970), 147 Ind.App. 691, 263 N.E.2d 264; Dandy Co., Inc. v. Civil City of South Bend (1979), Ind. App. 401 N.E.2d 1380.

10. The law is with the Plaintiff and against Defendant.

11. To the extent that any finding of fact should be treated as a conclusion of law or to the extent that nay conclusion of law should be treated as a finding of fact, the same shall be so construed so as to give effect to the court's decision herein.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant is hereby enjoined from using the Real Estate for the operation of an adult cabaret on and after October 30, 1989.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this injunction should run with the land and be

binding upon Defendant and Defendant's heirs, assigns, and successors in right, title and interest to the Real Estate, and a copy of this judgment is ordered to be recorded in the office of the Marion County Recorder.

Date: _____

_____
Judge, Marion County Municipal Court, Room No. 12

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IN THE

COURT OF APPEALS OF INDIANA

FOURTH DISTRICT

BLUE FLAME, INC., Appellant (Defendant Below),	)	
- v -	)	No. 49A04-8911-CV-487
THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA, Appellee (Plaintiff Below).	)	

APPEAL FROM THE MARION MUNICIPAL COURT
The Honorable David A. Jester, Judge
Cause No. E1226-072

CONOVER, J.

MEMORANDUM DECISION

Defendant-Appellant Blue Flame, Inc. (Blue Flame) appeals the trial court's judgment granting an injunction in favor of The Metropolitan Development Commission of Marion County (the Commission).

We affirm.

Blue Flame presents the following restated issues for our review:

1. whether the trial court erred in granting the Commission injunctive relief based upon Blue Flame's violations of the Adult Entertainment Business Zoning Ordinance of Marion County (Ordinance); and

2. whether the Ordinance may regulate the proximity of adult entertainment businesses to residentially zoned districts.

In 1985 Noel Seabolt (Seabolt) sold the Blue Flame, a tavern with live entertainment provided by country western bands, to Chester Sawyer (Sawyer) by land contract. Blue Flame received the warranty deed in 1987. Sawyer continued the country western entertainment until either December 1985 or January 1986 when he changed the entertainment to adult entertainment (adult

cabaret) as defined by the Ordinance. In January, 1986, the Commission issued Blue Flame a notice of zoning violation alleging Blue Flame a notice of zoning violation alleging Blue Flame operated as an adult cabaret within 500 feet of a residentially zoned district. Blue Flame then filed a petition for a zoning variance specifically seeking relief from Section 5 of the Ordinance which prohibits the establishment of an adult entertainment business within 500 feet of a residential zoning district.[1]

The Metropolitan Board of Zoning Appeals (Board) denied Blue Flame's petition. Due to stays of enforcement in the instant appeal and in the appeal of the variance denial, Blue Flame continued operating as an adult cabaret despite the variance denial. The trial court affirmed the Board's denial of the zoning variance. This court affirmed in an unpublished memorandum.

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[1] The Blue Flame is in an area zoned C-5. In Marion County, and adult cabaret is permitted in a C-5 district only if the cabaret is situated more than 500 feet from specified protected zoning districts, including residential districts.

The Commission then proceeded with its enforcement action and the trial court, after conducting a trial on the merits, issued an injunction in favor of the Commission and against Blue Flame. Blue Flame appeals.

Additional facts as necessary appear below.

Blue Flame contends the trial court erred in granting the injunction. Specifically, Blue Flame maintains its activity constitutes a nonconforming use an as such is permitted by the Ordinance. Further, Blue Flame contends the zoned residential areas within the 500 foot radius were not in fact used for residential purposes and as such, Blue Flame is entitled to continue its activities. We disagree.

To prevail in a zoning enforcement action, the Commission must prove both the existence of a zoning ordinance and a violation of the terms and provisions of that ordinance. DeSchamps v. Board of Zoning Appeals (1961), 241 Ind. 615, 174d N.E.2d 581, 583. One claiming a legal nonconforming use has the burden of proving its existence. Jacobs v. Mishawaka Board of Zoning Appeals (1979), 182 Ind.App. 500, 395 N.E.2d 834, 839. A nonconforming use is one permitted in a given area,

despite a violation of zoning regulations, because the nonconforming use existed on or before the effective date of the controlling ordinance. Metropolitan Development Comm. of Marion County v. Marianos (1980), 274 Ind. 67, N.E.2d 1267, 1269. The nonconforming use must exist continuously as such after the effective date of the ordinance. In Indiana, an alleged nonconforming use must be shown to have existed on the date the relevant zoning classification became effective. Ashley v. City of Bedford (1974), 160 Ind.App. 634, 312 N.E.2d 863,866. It is not sufficient to show such a use merely existed at some time prior to that date. Id.

Here, the Commission established both the existence and violation of the Ordinance. Blue Flame failed to established a nonconforming use since it began its adult entertainment activity in either December 1985 or January 1986, well after the Ordinance effective date of July 9, 1984. The fact a prior owner once operated an adult entertainment business for some 8-12 months, 10 years previously is of no consequence to Blue Flame's argument. Further, Blue Flame cites to no authority supporting this for its proposition a prior non-continuous use constitutes a qualifying

non-conforming use. Thus, this issue is waived. App.R. 8.3 (A). The trial court did not err in granting the injunction.

Blue Flame next contends the Ordinance is overbroad and constitutes a prior restraint on freedom of expression. Blue Flame relies on Police Department of Chicago v. Mosley (1972), 408 U.S. 92, S.Ct. 2286, 33 L.Ed.2d 212, maintains "[t]he First Amendment to the United State Constitution means that government has no power to restrict expression because of its message, ideas, its subject matter or its context." (Appellant's Brief, p. 13). Thus, Blue Flame contends the trial court's judgment must be reversed. We disagree.

It is true, "above all else, the First Amendment means that government has no power to restrict expression because of its message or ideas. . ." American Booksellers Ass;n v. Hudnut (7th Cir. 1985), 771 F.2d 323, 328, aff'd without opinion, (1986), 475 U.S.1001, 106 S.Ct. 1172, 89 L.Ed.2d 291, quoting Mosley, supra, 408 U.S. at 95. However, the State is not powerless to regulate the presentation of nude dancing. Miller v. Civil City of South Bend (7th Cir. 1990), 904 F.2d 1081, petition for cert. filed July 2, 1990. a sovereign may establish reasonable time, place and

manner restrictions on protected expression. Id., citing City of Renton v. Playtime Theaters, Inc. (1986), 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925.

Here, the relevant portion of the Ordinance provides

> The establishment, enlargement, reconstruction, resumption or structural alteration of any adult entertainment business shall be prohibited if such business is within 500 fee of two other such businesses or within 500 feet of any existing . . . . . residential zoning district within Marion County, Indiana.
>
> Provided further, that no adult entertainment business shall be established, enlarged, reconstructed, resumed or structurally altered unless the site or proposed site is located in a . . . . . ., C-5 (General Commercial) zoning district . . . . (Emphasis added).

Blue Flame is located on real estate zoned C-5. Therefore, an adult cabaret could be operated without a variance except for the fact Blue Flame is located within 500 feet of a zoned residential district. The Ordinance does not prohibit the activity, it merely, prohibits the offering of this type of entertainment within 500 feet of a residential zoning district.

The stated purpose of the Ordinance established a legitimate governmental interest. The Ordinance provides

> In the development and adoption of this ordinance, it is recognized that there are some adult business uses which due to their very nature have serious

> objectionable operational characteristics particularly when located in close proximity to residential neighborhoods, thereby having a deleterious impact upon property values and the quality of life in surrounding areas. It has been acknowledged by communities across the nation that state and local governmental entities have a special concern in regulating the operation of such businesses under their jurisdiction to ensure that these adverse secondary effects will not contribute to the blighting or downgrading of adjacent neighborhoods nor endanger the well-being of the youth in their communities. The special regulations deemed necessary these enterprises are set forth below. The primary purposes of these controls and regulations is to preserve the integrity and character of residential neighborhoods, to deter the spread of urban blight and to protect minors from the objectionable operational characteristics of these adult uses by restricting their close proximity to churches, parks, schools and residential areas.

By regulating the proximity of adult cabarets to residentially zoned districts, the Ordinance does not interfere with the rights protected by the First Amendment. The trial court did not err in granting the injunction.

Affirmed.

Chezem, J. Concurs.
Staton, J. Concurs.

IN THE

COURT OF APPEALS OF INDIANA

CAUSE NO. 49A04-8911-CV-487

BLUE FLAME, INC.,	)	
	)	
Appellant	)	
(Defendant Below),	)	
	)	Appeal From The
	)	Marion Municipal
v.	)	Court, Room No. 12
	)	
THE METROPOLITAN	)	
DEVELOPMENT COMMISSION	)	
OF MARION COUNTY,	)	The Honorable David
INDIANA,	)	A. Jester, Judge
	)	
Appellee	)	Trial Court No.
(Plaintiff Below).	)	E1226-072

PETITION TO TRANSFER

Appellant, Blue Flame, Inc., by counsel, pursuant to Indiana Appellate Rule 11(B), petitions the Court to transfer this cause. In support of this Petition, it states the following:

1. The Court rendered a decision in this cause on September 24, 1990, by its written opinion of the same date.

2. The Court of Appeals opinion was against the Appellant, Blue Flame, Inc.

3. On October 15, 1990, the Indiana Court of Appeals denied Appellant's Petition For Rehearing.

5. The Court of Appeals Memorandum Decision is in error as follows:

a. The Appellant herein contends that he is entitled to use his premises as they are zoned and according to the uses actually permitted within 500 feet as opposed to the classification which existed and which were shown on the Commissions's maps as residential, but which were, in fact, being used for commercial purposes thus denying the Appellant's rights to freedom of expression in respect to the First Amendment to the Constitution of the United States of America.

MEMORANDUM

The United States Supreme Court, in Young v. American Mini Theaters, Inc., 427 U.S. 50, 965 S. Ct. 2440, 492 Ed. 2d. 310, (1976), recognized that some regulation of speech may be permissible where necessary to protect the quality of life of this nation's citizens. The Court discussed the balancing of interests and concluded that the ordinance in question had a severe impact upon the Appellant, but was justified because the City of Detroit

had a legitimate interest in preserving its neighborhoods character.

The decision of the Court rested upon the interpretation of the 500 foot ordinance provision related to the measurement of the 500 feet from the residential burden to show the adverse impact of the excluded use on surrounding neighborhoods. In the case at bar, it is Appellant's contention that no satisfactory evidentiary basis exists in this case because the Commission, admitted in the testimony of its director, that the evidence offered by the Appellant was true in that the actual use of all property within 500 feet of the subject property. There were existing three (3) lots zoned residential, but which were acknowledged by all parties to being used for commercial purposes. It is the contention of the Appellant that the Commission, therefore, cannot meet the burden of showing harm to the residential neighborhoods where the residential zoned properties are, in fact, being used for commercial purposes. The ordinance Appellant complains of its exclusionary. The effect on the Appellant is severe because it reduces substantially the legitimate business opportunity on the subject property in spite of the evidence that the residential property which the ordinance is supposed to protect is, in fact, being used

with the Commission's knowledge and consent for commercial purposes for which it is not zoned. This unequal treatment is the essence of the Appellant's protest. The ordinance is strictly construed against the Appellant where it is clear that if you examine the factual situation the residentially zoned properties upon which the ordinance depends for its validity, are not, in reality, residential, but are, in fact, commercial. The Commission should not be able to ignore the actual use of the surrounding properties to thereby injure the Appellant in its use of its property.

WHEREFORE, the Appellant, Blue Flame, Inc., by counsel, requests the Court to grant a transfer to the Supreme Court, to vacate the Memorandum Decision of the Indiana Court of Appeals and to vacate the judgement of the Marion County Municipal Court, Room No. 12.

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ORDER OF COURT OF APPEALS OF INDIANA IN

CAUSE No. 49A04-8911-CV-00487 ON PETITION

FOR REHEARING:

"BLUE FLAME, INC. -VS- THE METROPOLITAN DEVELOPMENT COMM.

"You are hereby notified that the COURT OF APPEALS has on this day, 11/20/90 APPELLANT'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE"

****

ORDER OF SUPREME COURT OF INDIANA IN

CAUSE No. 49A04-8911-CV-00487 ON PETITION

TO TRANSFER:

"BLUE FLAME, INC. -VS- THE METROPOLITAN DEVELOPMENT COMM.

"You are hereby notified that the SUPREME COURT has on this date 4/08/91 APPELLANT'S PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR."

CITY-COUNTY GENERAL ORDINANCE NO. 44, 1984
METROPOLITAN DEVELOPMENT COMMISSION
DOCKET NO. 84-AO-4

ADULT ENTERTAINMENT BUSINESS

ZONING ORDINANCE

IN

MARION COUNTY, INDIANA

METROPOLITAN DEVELOPMENT COMMISSION

1984

Officially adopted
July 9, 1991

CITY-COUNTY GENERAL ORDINANCE NO.____

METROPOLITAN DEVELOPMENT COMMISSION

DOCKET NO. 94-AO-4

AN ORDINANCE to amend Marion County Council Ordnance No. 8-1957, as amended, the Zoning Ordinance for Marion County, Indiana, and fixing a time when the same shall take effect.

ADULT ENTERTAINMENT BUSINESS ORDINANCE

NOW THEREFORE, BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS AND MARION COUNTY, INDIANA

SECTION 1. Repealer. That sections 1(A)(3), 1(A)(4) and 1(E)(1) of the COMMERCIAL SPECIAL EXCEPTIONS ZONING ORDINANCE OF MARION COUNTY, INDIANA (Ordinance 76-AO-2) are hereby specifically repealed.

SECTION 2. Amendment. That Marion County Council No. 8-1957, adopted by the Marion County Council on March 28, 1957, and subsequently amended and all zoning ordinances adopted a parts thereof, as amended, be further amended to read as follows:

SECTION 3. Intent and Purpose

In the development and adoption of this ordinance, it is recognized that there are some adult business uses which due to their very nature have serious objectionable operational characteristics particularly when located in close proximity to residential neighborhoods, thereby having a deleterious impact upon property values and the quality of life in such surrounding areas. It has been acknowledged by communities across the nation that state and local governmental entitles have a special concern in

regulating the operation on such businesses under their jurisdiction to ensure that these adverse secondary effects will not contribute to the blighting or downgrading of adjacent neighborhoods nor endanger the well-being of the youth in their communities. The special regulations deemed necessary to control the undesirable externalities arising from these enterprises are set forth below. The primary purpose of these controls and regulations is to preserve the integrity and character of residential neighborhoods, to deter the spread of urban blight and to protect minors from the objectionable operational characteristics of these adult uses by restricting their close proximity to churches, parks, schools and residential areas.

SECTION 4. Definitions

A. "Adult Cabaret" shall mean a nightclub, bar, theater, restaurant or similar establishment which frequently features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainments, where such performances are distinguished or characterized by an emphasis or specified sexual activities or by exposure of specified anatomical areas and/or which regularly feature films, motion pictures, video cassettes, slides or other photographic reproductions which are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons.

B. "Adult Entertainment Business" shall mean an adult bookstore, adult motion picture theater, adult mini motion picture theater, adult motion picture arcade, adult cabaret, adult drive-in theater, adult live entertainment arcade or adult service establishment.

C. "Services Involving Specified Sexual Activities or Display of Specified Anatomical Area", as uses in subsection B, shall mean and include any combination of two or more of the following activities:

1. live performances by topless and or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainments, where such performances are distinguished or characterized by an emphasis on specified sexual activities or specified anatomical area;

2. "Specified Anatomical Areas" shall mean and include any of the following:

(a) less then completely and opaquely covered human genitals, public region, buttocks, anus or female breasts below point immediately above the top of the areolae.

SECTION 5. Prohibitions

The establishment, enlargement, reconstruction, resumption or structural alteration of any adult entertainment business shall be prohibited if such business is within 500 feet of any existing church zoning district, school zoning district, pard zoning district, agricultural zoning district, historic preservation zoning district or residential zoning district with Marion County, Indiana.

SECTION 6. Measurement of Distances

The distance between one adult entertainment business and another adult entertainment business shall be measured in a straight line, without regard to intervening

structures or objects, from the closest exteriors structural wall of each such business. The distance between an adult entertainment business and any church, school, park, agricultural, historic preservation, or residential zoning district shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior structural will to the adult entertainment business to the nearest property line of the church, school, park or residential zoning district. If any adult entertainment business shall be included in determined the closest exterior structural wall of said establishment.

SECTION 7. Effective Date

An emergency exists for the passage of this ordinance and the same shall be in full force and effect from and after its passage.

NOW BE IT FURTHER ORDAINED that an emergency exists for the passage of this ordinance and that the same shall be in full force and effect from the after this date.

DATED:_____

CITY-COUNTY COUNCIL OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA

ATTEST:_____
(Clerk)

_____
Beurt SerVaas
President

Supreme Court, U.S.
FILED
SEP 4 1991
OFFICE OF THE CLERK

(2)

No. 91-70

In The

Supreme Court of the United States

October Term, 1991

BLUE FLAME, INC.,

Petitioner,

v.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

BRIEF OF RESPONDENT IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent respectfully disagrees with Petitioner's statement of the question presented for review. The following is submitted as a more accurate statement of the question presented:

> Are the rights of Petitioner to freedom of expression under the First Amendment to the Constitution of the United States violated by the application of the provvisions of the Adult Entertainment Business Ordinance of Marion County, Indiana, which prohibit the operation of an adult cabaret within 500 feet of a residential zoning district, despite the fact that the residential zoning district is not currently being used for residential purposes.

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Young v. American Mini Theaters, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976).....4, 6, 7, 10

Respondent, The Metropolitan Development Commission of Marion County (hereinafter referred to as the "Commission"), respectfully requests that this Court deny the pending Petition for Writ of Certiorari, in which Petitioner is seeking review of the opinion issued below by the Court of Appeals of Indiana, Fourth District. The opinion of the Court of Appeals was an unpublished Memorandum Decision, which is set forth verbatim by Petitioner in the Appendix to Petitioner's Brief filed herein (Pet., A-9–A-16). The Commission accepts the sections of Blue Flame's Brief titled Opinion Below (Pet., 3), Jurisdiction (Pet., 5), and Constitutional and Statutory Provisions Involved (Pet., 6).

STATEMENT OF THE CASE

The Commission does not accept Blue Flame's Statement of the Case. Therefore, the Commission offers the following Statement of the Case for the Court's consideration:

Blue Flame, Inc. purports to be an Indiana corporation doing business as "Blue Flame", a tavern which is located at 5478 Brookville Road, Indianapolis, Marion County, Indiana (hereinafter referred to as the "Real Estate"). On or about January 9, 1986, the Blue Flame was issued a notice of zoning violation by the Commission in which it was alleged that the establishment was operating as an adult cabaret within 500 feet of a residentially zoned district. Following receipt of the notice of zoning violation, Blue Flame, by and through its attorneys, filed a petition for a zoning variance by which Blue Flame

sought approval for the ongoing adult use. Specifically, Blue Flame sought relief from Section 5 of the Adult Entertainment Business Zoning Ordinance of Marion County, Indiana which, *inter alia*, prohibits the establishment of an adult entertainment business within 500 feet of a residential zoning district (Pet., B-4).

It should be noted that the Real Estate is zoned C-5, a classification which permits a multitude of enumerated commercial uses. In Marion County, Indiana, adult businesses, including adult cabarets, are permitted in C-5 zoning districts, subject to certain conditions and restrictions. An adult cabaret is permitted in a C-5 district only if the cabaret is situated more than 500 feet from specified protected zoning districts, including residential districts (Pet., B-4). The evidence in the case below established that the Blue Flame tavern was situated closer than 500 feet to D-5 (residential) zoning districts.

In 1986, Blue Flame was denied its petition for zoning variance after a hearing before the Metropolitan Board of Zoning Appeals. Thereafter, because of stays of enforcement granted by the Municipal Court in the enforcement case, and by the Marion Superior Court, Civil Division, Room 3, in the case involving judicial review of the variance denial, Blue Flame continued operating as an adult cabaret despite the variance Board's adverse decision.

The certiorari review of the variance denial was conducted by the Marion Superior Court, Civil Division, Room 3. The action of the Metropolitan Board of Zoning Appeals in denying the requested zoning variance was affirmed by the trial court in that case. Thereafter, the

Superior Court's decision was affirmed by the Court of Appeals of Indiana in an appeal totally distinct from the one which is the subject of the pending Petition for Writ.

Following completion of the certiorari proceedings in the Indiana Courts, the Commission proceeded with its pending enforcement action (which had been subject to a lengthy stay) in the Marion County Municipal Court, Room 12. Following a trial on the merits, the Marion County Municipal Court, Room 12, issued an injunction in favor of the Commission and against Blue Flame. The injunction issued in the enforcement action was the subject of Blue Flame's appeal to the Court of Appeals of Indiana and is the subject of Petitioner's pending request for a writ of certiorari from this Honorable Court.

As the procedural history of the case documents, Blue Flame has been afforded multiple opportunities to obtain administrative and/or judicial sanction for the adult use to which the Real Estate has been put. Stays have been granted by Indiana Courts in order to protect Blue Flame's commercial interests during the pendency of the numerous proceedings which have been initiated since 1986, including: a variance request; an appeal of the variance denial to the trial court; an appeal of the trial court's refusal to overturn the variance denial to the Court of Appeals of Indiana; a trial of the Commission's enforcement action in which the Commission sought an injunction; and an appeal to the Court of Appeals of Indiana and to the Supreme Court of Indiana of the trial court's judgment granting an injunction. It is in this procedural and historical context that the United States Supreme Court is being asked by Petitioner to grant certiorari review herein.

ARGUMENT

I.

BLUE FLAME'S PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

In its opinion, the Court of Appeals of Indiana looked to this Court's prior decisions for guidance in dealing with the constitutional question raised by Blue Flame. The Court of Appeals carefully considered and addressed the First Amendment issue, which was one of the bases upon which Blue Flame asserted the case should be decided.

In addressing the First Amendment question, the Court of Appeals appropriately directed its attention to two United States Supreme Court decisions which have upheld ordinances similar to the Adult Entertainment Business Ordinance of Marion County, Indiana. Both *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986), provide controlling insight in the present controversy. The Supreme Court held in both *Young* and *Renton* that the municipality's interest in planning and regulating the commercial use of property is a valid basis for restricting the location of movie theaters which present what may be described as adult entertainment. The Court found the challenged restrictions to be neither an impermissible prior restraint, nor an invalid suppression of speech and expression.

Further, the Supreme Court in those cases held that the reviewed ordinances constituted valid regulation of protected expression because, although each regulated the time, place and manner of expression, each was sufficiently neutral so as not to effect a total suppression or ban of the regulated activity. Instead, each ordinance merely governed the locale within which adult establishments could be situated.

Blue Flame in its Petition has set forth at Appendix "B" what Petitioner describes in its Table of Contents (Pet., 2) as "pertinent parts" of Marion County's Adult Entertainment Business Zoning Ordinance. Blue Flame excerpted only approximately four (4) pages from the fourteen (14) page ordinance and excluded from its Appendix virtually all of the definitions and certain relevant portions of the prohibitions. The relevant portion of the Marion County Adult Entertainment Business Zoning Ordinance from which Blue Flame sought relief is as follows:

> SECTION 5. *Prohibitions*
> The establishment, enlargement, reconstruction, resumption or structural alteration of any adult entertainment business shall be prohibited if such business is within 500 feet of two other such businesses or within 500 feet of any existing church zoning district, school zoning district, park zoning district, agricultural zoning district, historic preservation zoning district or residential zoning district within Marion County, Indiana.
>
> Provided further, that no adult entertainment business shall be established, enlarged, reconstructed, resumed or structurally altered unless

> the site or proposed site is located in a C-4 (Community-Regional Commercial) zoning district, C-5 (General Commercial) zoning district, C-6 (Thoroughfare Service) zoning district, C-7 (High Intensity Commercial) zoning district or C-ID (Commercial-Industrial) zoning district.
>
> Provided further, that no adult entertainment business shall be established, enlarged, reconstructed, resumed or structurally altered in a C-4 (Community-Regional Commercial) zoning district unless the site or proposed site is located within an integrated center."

Blue Flame's real estate is zoned C-5, and Blue Flame could have operated an adult cabaret on the Real Estate without a variance except for the fact that the establishment was located closer than 500 feet to a residential zoning district. It was the distance requirement which made the use unlawful and from which Blue Flame sought relief. The Adult Entertainment Business Zoning Ordinance does not prohibit the offering of adult entertainment, including partially clad females exposing their breasts and/or buttocks. The ordinance merely prohibits the offering of that type of entertainment within 500 feet of a residential zoning district (and certain other protected districts, such as church and school districts).

In both *Young* and *Renton,* such ordinances and the associated regulation of content-based activity have been sanctioned where the regulations do not result in a total ban or suppression and where a legitimate governmental interest is served. *Young,* 427 U.S. 50; and *Renton,* 475 U.S. 41. Blue Flame's evidence wholly failed to show that a total ban or a prior restraint resulted from the subject ordinance. Likewise,

Blue Flame failed to show that no legitimate governmental interest was served by the ordinance.

In its argument herein, Blue Flame cited this Court's decision in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981). Although the ordinance at issue in *Schad* was held to be invalid and overbroad, the facts and factors which were relied upon by this Court in *Schad* are easily distinguishable from the facts in the instant controversy. In *Schad*, the local authorities adopted an ordinance, the effect of which was to totally exclude live entertainment, including live nude dancing, from the Borough of Mt. Ephraim. No such ban is contemplated by or has resulted from the adoption of Marion County's ordinance. Instead, Marion County has, consistent with this Court's prior decisions, regulated the placement of adult entertainment in relation to residentially zoned districts. This Court in *Young v. American Mini Theaters, Inc.*, approved such regulation as legitimate. *Young*, 427 U.S. 50. Similarly, the Court in the *City of Renton v. Playtime Theaters, Inc.* case upheld Renton's ordinance which prohibited the location of constitutionally protected speech within 1,000 feet of a residential zone. *Renton*, 475 U.S. 41. In that case, this Court sanctioned the time, place and manner regulation even though Playtime Theaters, Inc. submitted evidence and argument that because of the regulation, it was left with no "commercially viable" adult theater sites within the limited area rendered available through operation of the subject ordinance. Despite that argument, the Supreme Court rejected the attack upon the time, place, and manner regulation, and concluded:

> That Respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does

> not give rise to a First Amendment violation . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices . . .

Id., 475 U.S. 41 at 54.

Blue Flame has made no argument that it has been deprived of an ability to locate its adult business in a viable commercial area within Marion County, Indiana, nor would such an argument be valid. Indeed, Marion County's 500 foot distance restriction relative to the proximity between the adult business establishments and residentially zoned real estate is only half of that imposed by the local ordinance which was examined and approved by this Court in the *City of Renton* case. *Id.*, 475 U.S. 41.

II.

BLUE FLAME'S PETITION SHOULD BE DENIED BECAUSE BLUE FLAME CITES NO AUTHORITY SUPPORTING ITS CONTENTION THAT THE RESTRICTION SHOULD APPLY ONLY TO RESIDENTIALLY USED AREAS AND NOT TO RESIDENTIALLY ZONED AREAS

The entire thrust of Blue Flame's argument centers upon its contention that Marion County's zoning ordinance is overly restrictive by precluding establishment of an adult cabaret within 500 feet of a residential zoning district. Blue Flame concedes that its establishment is, as the trial court found, closer than 500 feet to a residential zoning district. Blue Flame complains, however, because

at the time of trial, the residentially zoned property was being used as a parking lot and not as a residence. Blue Flame asserts that the Court should direct its inquiry to the actual use of property at the time of ordinance application, rather than to the zoning classification which has been assigned to such property. Blue Flame's argument should fail.

In any metropolitan area, including in Marion County, Indiana, real estate is assigned a zoning classification based upon planning and legislative decisions respecting the highest and best use of property, consistent with governmental interest in providing for orderly and efficient growth within the community. It is, of course, not at all uncommon for real estate to bear a zoning classification which was assigned prospectively and which reflects the community's intention respecting the use of that land, rather than a reflection of the actual use to which the land is being put at the time the classification is assigned. Were Blue Flame's argument to prevail, zoning authorities could never safely plan for the development of new housing areas. Blue Flame presumably would maintain that an adult cabaret could be built in close proximity to a residentially zoned area so long as there was no house or apartment situated thereon and no one yet living on the premises. Thus, zoning authorities would be deprived of any ability to plan for future residential development by zoning, because the plan would be subject to disruption by placement of adult uses immediately adjacent to the residential zones.

Although not discussed by Blue Flame in its brief, it should be noted that because of the residential zoning classification assigned to the real estate in close proximity

to Blue Flame's adult cabaret, such real estate could be converted legally from its present parking lot use to a residential use. If, in the meantime, Blue Flame has been authorized to ignore the zoning classification and to establish its adult cabaret, the very deleterious effects about which the Adult Entertainment Business Zoning Ordinance specifically concerns itself would be realized and would inhibit, deter, or otherwise adversely impact the residential use. Blue Flame's argument finds no support in the precedent established by this Court. Although the *Young v. American Mini Theaters, Inc.* case refers to "residential area", the Court does not suggest that the use, as contrasted with the zoning classification, is the operative criteria. *Young*, 427 U.S. 50. In the *City of Renton v. Playtime Theaters, Inc.* case, the Court specifically approved an ordinance which restricted location of adult motion picture theaters within 1,000 feet of any residential "zone." *Renton*, 475 U.S. 41. Marion County, Indiana, has chosen to secure the protection of its residentially zoned areas, as did the City of Renton. Despite Blue Flame's arguments to the contrary, such protection is constitutionally valid, and Blue Flame's Petition should be denied.

CONCLUSION

The decision rendered by the Court of Appeals of Indiana was wholly consistent with the precedent established by this Court. Marion County, Indiana, has not attempted to ban the type of adult activity which is promoted by Blue Flame. Instead, Marion County has placed reasonable regulation upon the time, place, and

manner of Blue Flame's adult entertainment activities. Such restrictions have been consistently approved by this Court in the past. For all of the reasons set forth herein, the Commission respectfully prays that Blue Flame's Petition be denied.

Respectfully submitted,

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